



Shareholders' Agreement - Checklist

We set out below a typical checklist that is used when working out what we need to know when drafting a shareholders' agreement.

The articles of association of the company (i.e. the company's constitution) often include matters which are included in shareholders' agreements and vice versa. Therefore, we usually need to be provided with a lot more information than you believe would be necessary to correct draft a shareholders agreement. This is because once we understand the 'bigger picture'; we can then work out which of these two documents should include certain matters. For example, shareholders often want to keep their business dealings confidential so they usually favour putting many provisions in a shareholders' agreement which, if drafted well, does not need to be filed at Companies House.

The checklist below is a good starting point; however, answering all of the questions in the checklist would not mean that you have an effective agreement in place to regulate the relationship between all the shareholders. Indeed, it would be counterproductive to 'cobble together' one simple agreement simply based on your answers as you could:

- inadvertently be in contravention of the Companies Act 2006 by doing so; and
- incur unnecessary costs in the future trying to clarify what was actually agreed (particularly if the current articles of association conflict with your answers).

As lawyers, our objective would be to analyse your answers and work out which of the two documents (shareholders' agreement or articles of association) should contain the information provided. It may be, for example, that the articles of association already deal with certain matters such as how share transfers are dealt with. We would consider the Companies Act 2006 with a view to disclosing as little information as possible at Companies House, unless you direct otherwise.

THE CHECKLIST

1. THE COMPANY

- 1.1 Name
- 1.2 Registered number
- 1.3 Date of incorporation
- 1.4 Business description of the Company
- 1.5 Registered office address
- 1.6 Principal office address (if different)
- 1.7 Company Secretary (if any)
- 1.8 Authorised share capital (if any)
- 1.9 Issued share capital

2. ADMINISTRATIVE MATTERS

- 2.1 Accountants
- 2.2 Bankers
- 2.3 Registered office
- 2.4 Accounting reference date

3. EXISTING SHAREHOLDERS

- 3.1 Full names of the shareholders

- 3.2 Residential addresses of the shareholders
- 3.3 Shareholdings
- 3.4 Classes of shares

4. SUBSCRIPTIONS FOR SHARES AND LOANS

- 4.1 Subscriptions for shares:
 - 4.1.1 Names of subscribers
 - 4.1.2 Addresses of subscribers
 - 4.1.3 Amounts subscribing
 - 4.1.4 Number and class of shares subscribing
- 4.2 Loans:
 - 4.2.1 Names of lenders
 - 4.2.2 Amount of loans
 - 4.2.3 Repayment terms
 - 4.2.4 Interest
 - 4.2.5 Security
 - 4.2.6 Other?
- 4.3 Finance:
 - 4.3.1 Any future obligations to fund business?
 - 4.3.2 If so, on what terms and what will happen if any of the parties default?

5. THE BOARD OF DIRECTORS

- 5.1 Existing directors:
 - 5.1.1 Full name
 - 5.1.2 Address
- 5.2 New directors (if any):
 - 5.2.1 Name
 - 5.2.2 Residential address
 - 5.2.3 Service address (if different from residential address)
 - 5.2.4 Date of birth
 - 5.2.5 Occupation
 - 5.2.6 Executive or non-executive?
 - 5.2.7 Name of position in the Company?
- 5.3 Right of appointment:
 - 5.3.1 Will any shareholder have a right to be appointed a director?
 - 5.3.2 If yes, will there be a minimum level of shareholding required to have board representation?
- 5.4 Right of observation:
 - 5.4.1 Will any shareholder have a right to appoint a representative to attend as an observer at board meetings?
 - 5.4.2 If yes, is this right in addition to, or instead of, any right of appointment?
 - 5.4.3 If yes, will there be a minimum level of shareholding required to have this right of observation?
- 5.5 Regularity of meetings and location:
 - 5.5.1 How regularly will board meetings be held? e.g. one per month
 - 5.5.2 Any requirements relating to location of meetings?
- 5.6 Notice: How much notice of board meeting is required? e.g. 5 business days
- 5.7 Quorum:
 - 5.7.1 How many directors must be present for the meeting to be quorate? e.g. 2
 - 5.7.2 Are there any directors that must be present for the meeting to be quorate? e.g. majority shareholder
- 5.8 Chair:
 - 5.8.1 Will there be a chair of the Board?
 - 5.8.2 Who will appoint the chair?
 - 5.8.3 Will the chair have a casting vote in the event of equality of votes?
 - 5.8.4 Who is/ will be chair?
- 5.9 How will board decisions be made? (Also see Sections 7 and 8).
 - 5.9.1 Simple majority?
 - 5.9.2 Specified majority (e.g. $\frac{3}{4}$ majority)?

- 5.9.3 Unanimous decisions?
- 5.9.4 A mixture of the above? If yes, identify which decisions require which majority
- 5.10 Any specific management/ decision making structure envisaged?
- 5.11 Who is/ will be managing director (i.e. who will manage the business on a day to day basis?)

6. INFORMATION RIGHTS (IN ADDITION TO STATUTORY RIGHTS)

- 6.1 Will shareholders have a right to receive annual accounts? If yes:
 - 6.1.1 Who? All shareholders or specified shareholders or shareholders with a specified percentage shareholding
 - 6.1.2 Will the annual accounts be audited?
 - 6.1.3 When? _____ months after year end
- 6.2 Will shareholders have the right to receive management accounts? If yes:
 - 6.2.1 Who? All shareholders or specified shareholders or shareholders with a specified percentage shareholding
 - 6.2.2 Any specific information to be included?
 - 6.2.3 Monthly or quarterly?
 - 6.2.4 When? _____ days after period end
- 6.3 Shareholders to be provided with any other information?

7. MATTERS REQUIRING SHAREHOLDER MAJORITY CONSENT

- 7.1 Will any matters require the written consent of a shareholder majority?
- 7.2 If yes, what level of shareholding approval will be required (e.g. 50%, 75%,100%)?
- 7.3 If yes, which matters will require shareholder approval?

8. MATTERS REQUIRING BOARD APPROVAL

- 8.1 Will any matters require board approval?
- 8.2 If so, what level of board approval is required (e.g. 50%, 75%, 100%)?
- 8.3 If so, which matters will require board approval?

9. UNDERTAKINGS

- 9.1 Will any shareholder be required to give undertakings? If so, which shareholders?
- 9.2 If yes, will the following undertakings be given?
 - 9.2.1 Work exclusively for the Company
 - 9.2.2 Promote best interests of the Company
 - 9.2.3 Ensure all business developments to be through the Company
 - 9.2.4 Not to disclose confidential information

10. DIVIDEND AND DISTRIBUTION POLICY

- 10.1 Will there be a dividend policy? If yes:
 - 10.1.1 If there are profits available for distribution, should all or a percentage of the profits be distributed each year?
 - 10.1.2 Will profits be retained for future expansion of the business?
 - 10.1.3 Will there be a period of time during which no dividends should be declared?
 - 10.1.4 Will payment of dividends only be possible after specified debts have been repaid, e.g. bank borrowing, shareholder loans?

11. EMPLOYMENT CONTRACTS

- 11.1 Do any shareholders have existing employment contracts?
- 11.2 Will (new) employment agreements be required for each director and/or each shareholder?

12. ISSUE OF NEW SHARES

- 12.1 Pre-emption rights: Will there be pre-emption rights requiring any new shares to be offered to existing shareholders?
- 12.2 Pre-emption right exclusions: Will there be any exceptions to the general rule:
- 12.2.1 New issues that are approved by a _____ % (insert percentage) shareholder majority
- 12.2.2 New issues pursuant to any share options

13. TRANSFER OF SHARES

- 13.1 Pre-emption right: Will there be pre-emption rights requiring shares that are to be transferred to be offered first in accordance with specified pre-emption provisions?
- 13.2 Pre-emption priority: If yes, please confirm if the following priority in which shares should be offered is acceptable?
- 13.2.1 first, to the Company and/or any employee benefit trust
- 13.2.2 second, to existing shareholders in proportion to their existing shareholdings
- 13.3 Pre-emption exclusions: Can shareholders transfer their shares to any of the following without following the order of pre-emption noted above?
- 13.3.1 Transfers to existing members?
- 13.3.2 Transfer with the consent of shareholders? If so, specify the percentage. e.g. 75%
- 13.4 Tag Along: Do you want to give minority shareholders "tag along" rights? Tag along rights protect minority shareholders in that they prevent the sale of shares if that sale would give the buyer control of the company (more than 50%) unless the buyer also offers to buy every other member's shares
- 13.5 Drag Along: Do you want to give majority shareholders "drag along" rights? What percentage shareholding do you want to trigger the "drag along"? These rights permit shareholder(s) owning more than a specified percentage of the company's shareholding (e.g. 75%) that have agreed to sell their shares to a buyer to compel the remaining shareholders to sell their shares to the same buyer on the same terms

14. COMPULSORY TRANSFERS

- 14.1 Compulsory transfers: Will any of the following events require a shareholder to compulsory transfer any of his shares?
- 14.1.1 death of the shareholder
- 14.1.2 a shareholder ceasing to be an employee
- 14.1.3 a shareholder ceasing to provide consultancy services
- 14.1.4 bankruptcy of an individual shareholder
- 14.1.5 insolvency of a corporate shareholder
- 14.1.6 material breach of the shareholders' agreement
- 14.1.7 material breach of a employment agreement
- 14.1.8 material breach of a consultancy agreement
- 14.2 Applicability of compulsory transfers:
- 14.2.1 Will the compulsory transfer provisions apply to all shareholders?
- 14.2.2 Will any shareholders be excluded from the compulsory transfer provisions? If so, please specify
- 14.2.3 Will any shares be excluded from the compulsory transfer provisions? For example, sometimes shares in issue at a certain date are excluded or in certain circumstances (e.g. specified length of service) a percentage of a person's shareholding is excluded from the compulsory transfer provisions
- 14.2.4 Can the compulsory transfer provisions be overridden by:
- (a) a shareholder majority of _____ %?
- (b) the board? If so, please specify if any specific directors are required to give their consent?
- 14.3 Valuation: In the event of a compulsory transfer will the shares be valued at fair value or lower of cost and fair value?

14.4 Shareholder protection scheme: Do you want to put a scheme in place to ensure that funds are available to purchase a deceased person's shares? Would you like further information about such schemes?

15. GOOD LEAVERS/ BAD LEAVERS:

15.1 In the case of shareholders that cease to be employees of or consultants to the Company a distinction is sometimes made between good leavers and bad leavers. This distinction can be used to determine whether a person is subject to compulsory transfer provisions and if so at what price the shares should be sold at. Do you want to distinguish between good leavers and bad leavers?

15.2 If yes, which of the following standard circumstances will result in the person being a good leaver?

15.2.1 death of employee

15.2.2 permanent incapacity of employee

15.2.3 attaining retirement age as set out in his contract of employment

15.3 If yes, which of the following additional circumstances will result in the person being a good leaver?

15.3.1 the Company (or a member of its group) terminating his contract of employment or consultancy, as the case may be, by serving notice (in accordance with the terms of that contract) in circumstances where the person is not in breach, nor has been in breach, of his contract

15.3.2 dismissal by the Company (or a member of its group) which is determined by an employment tribunal or at a court of competent jurisdiction from which there is no right to appeal to be wrongful or constructive

15.3.3 the board determining that he is a good leaver. If yes, will this be subject to prior written approval of a specified shareholder majority? If yes, what percentage shareholding

15.3.4 ceases to be an employee/consultant after _____ years from his commencement date

15.4 Will good leavers be subject to the compulsory transfer provisions as well as bad leavers?

15.5 Will a good leaver be required to sell their shares at fair value or the lower of cost and fair value?

15.6 Will a bad leaver be required to sell their shares at fair value or the lower of cost and fair value?

16. RESTRICTIVE COVENANTS

Restrictive covenants are commonly entered into as part of a shareholders' agreement. This is because the success of the business is based on the experience of the shareholders and if they were to leave the Company to create or work for a competitor they could significantly affect the business.

16.1 Details of any existing restrictive covenants that the shareholders have given (e.g. in service /employment agreements)

16.2 Which parties will be subject to restrictions?

16.3 Non-compete:

16.3.1 Restriction? Yes/ No

16.3.2 Any territorial limitations?

16.3.3 Specific description of competing business or general description?

16.4 Non-solicitation restriction of customers, clients, suppliers, agents or distributors? Yes/ No

16.5 Non-solicitation of employees:

16.5.1 Restriction? Yes/ No

16.5.2 All employees or key employees?

16.6 Duration of Restrictions:

16.6.1 Whilst party is a shareholder? Yes/ No

16.6.2 Whilst party is a director or employee or consultant? Yes/ No

16.6.3 Time: e.g. 6-24 months after party ceases to be shareholder/ director/employee/ consultant

17. MISCELLANEOUS MATTERS
17.1 Any other matters

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March 2010